MM Dkt. 92-51

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In the Matter of	)	
	)	
Petitions for Declaratory Ruling	)	MMB File No. 910221A
Regarding Reversionary and	)	MMB File No. 870921A
Security Interests	)	

To: Chief, Mass Media Bureau

COMMENTS OF AMERITRUST COMPANY NATIONAL ASSOCIATION, CHEMICAL BANK AND NEW BANK OF NEW ENGLAND, N.A.

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SUMMARY

Ameritrust Company National Association, Chemical Bank and Bank of New England, N.A. (the "Banks") support the Petition for Declaratory Ruling filed by Hogan & Hartson in this proceeding.

Senior lenders such as the Banks serve an important function in the broadcast industry. Loans from senior lenders enable existing licensees to upgrade and improve their facilities, and help those without "deep pockets" to enter the broadcast field. The end result is an advancement of the public interest, convenience and necessity.

To secure their loans to broadcast companies, senior lenders ordinarily take a security interest in the assets of the stations owned by such companies. Lenders and borrowers have assumed that a security interest in a station's assets was sufficient to give the lenders a priority interest in the full value of such station, including the proceeds generated from a sale of the station as a going concern. However, several recent bankruptcy court decisions, relying on Commission dicta, have called into question this basic assumption, causing serious concerns among lenders about the security of their broadcast loans.

The Commission's prior statements that a security interest may not be granted in a broadcast license rest primarily on the premise that such a license is not an "owned asset" or "property." However, as the Commission has recognized, a broadcast license grants rights to the licensee. Among these are

the right to transfer or assign the license, subject to Commission approval, and to realize the proceeds of such transaction. It is simply such rights in which a limited security interest would attach. Similar security interests in licenses or in license rights have been recognized in numerous other fields, and can be recognized with respect to broadcast licenses consistent with the Communications Act and the Commission's rules and policies thereunder.

Recognition of a limited security interest in a broadcast license will not impair the responsibility of licensees or their accountability to the Commission. Licensees will remain completely subject to the regulatory authority of the Commission. Any transfer or assignment of the license will continue to require Commission approval. Moreover, such security interests will be subject to all the rules and policies of the Commission.

The Commission's recognition of a limited security interest in broadcast licenses or in rights attendant thereto will benefit the public interest and the broadcast industry, by removing what is an increasingly serious impediment to broadcast lending. Conversely, failure to take such action will have a serious adverse effect on the availability of capital to the broadcast industry, threatening the quality of broadcast stations and impairing the Commission's policy of promoting diversity of ownership of broadcast stations.

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I. INTRODUCTION AND BACKGROUND

Ameritrust Company National Association, Chemical Bank and New Bank of New England, N.A. (collectively, "Commenters") hereby submit their comments in support of the Petition for Declaratory Ruling ("Petition") filed by Hogan & Hartson ("Petitioner") in the above-referenced proceeding. The declaration sought by Petitioner--that lenders may take a limited security interest in an FCC license--is consistent with the Communications Act of 1934, as amended ("Communications Act") and would further the Commission's policies. Such a declaration, or an equivalent clarification of Commission policies, is necessary to stem a growing tide of court cases which, in reliance on Commission dicta, have severely disrupted the expectations of the parties to broadcast lending transactions. Conversely, the failure of the Commission to properly clarify its policies in this area may have a disastrous impact on the availability of capital for broadcasters and other Commission licensees.

A. The Current Broadcast Lending Environment

The United States economy is in the midst of a "liquidity crisis," with all sectors of the economy experiencing a shortage of investment capital. The shortage of capital is particularly acute in the broadcasting industry, where many broadcast licensees are having difficulty meeting their debt payments. Numerous broadcasters are currently attempting to restructure or refinance their loans, or otherwise to "work out" of defaults under their loan facilities. Some broadcasters have entered, or in the near future will enter, into receivership or bankruptcy proceedings.

In this environment, it is essential to the broadcasting industry that the confidence of broadcast lenders be preserved. The continued participation of these lenders in the industry is required (i) to provide refinancing and sources of capital for broadcasters currently facing financial difficulties, (ii) to provide funds for the expansion and improvement of broadcast services, (iii) to finance acquisitions of broadcast properties, thus providing existing broadcasters with a source of liquidity and preserving the opportunity for new entry into the industry, and (iv) to further the Commission's goal of diversity in broadcasting, for example, by enabling minorities and others without "deep pockets" to participate in station ownership.

Broadcast lending is now severely inhibited by growing lender concerns about the security of their loans. The Commission has the opportunity to alleviate these concerns, and to encourage future broadcast lending, through the clarification

of its policies in this proceeding. Such clarification is necessary to enable broadcasters to compete in the market for debt capital on a "level playing field" with other borrowers.

B. The Expectations of Parties to a Broadcast Lending Transaction

Each of the Commenters is a commercial bank which has been active in lending to broadcasters. The Commenters function as "senior secured lenders"--i.e., their loans are intended to be repaid prior to the repayment of other indebtedness of the borrower, and to be secured by a first-priority lien on all of the assets of the borrower. Virtually all commercial banks make their loans on this basis, which enables them to limit their lending risks to a reasonable level and thus to lend funds on a basis that is significantly less expensive to the borrower than unsecured loans, subordinated debt or other forms of capital.

Most broadcasters have obtained some sort of senior financing secured by the assets of their station(s). Some or all of the additional capital required by the broadcaster is supplied in the form of equity. In certain cases, broadcasters have also obtained "intermediate" or "mezzanine" financing, consisting of loans which (whether or not secured) are junior in right of payment to the senior secured loans. It is the clear expectation of all participants in this capital structure that the senior secured lender will be entitled to repayment of its loans--if necessary, out of the proceeds from sale of the station assets subject to its security interest--prior to the repayment of other creditors and prior to any other application of station sale proceeds.

Prudent lending criteria require that the value of the assets serving as collateral for a senior secured loan be sufficient to repay the loan should cash flow from the borrower's operations prove insufficient for such purpose. In valuing the collateral of a broadcast station, senior secured lenders have traditionally looked to the value of the station as a going concern--i.e., the value that would be realized from the sale of the station's assets (including an assignment of the station's FCC licenses, pursuant to Commission consent) in an arm's-length transaction. If this were not the case, broadcast loans could be made at only a fraction of the levels that historically have been available, since the "liquidation value" of a station's tangible assets frequently constitutes only a modest portion of the true "market value" of the station.

Broadcasters and lenders have long assumed that the station assets securing a broadcast loan could be sold at market value. The fact that a portion of this market value might be deemed attributable to the station's FCC operating authorizations has not been considered inconsistent with this assumption, since broadcast licensees, while not "owning" a station's licenses, have nevertheless been permitted to dispose of station assets (including station licenses) at their full "going concern" value.

Nor was this approach to valuation of broadcast station collateral considered inconsistent with Commission dicta to the effect that a broadcast license may not be hypothecated by means of a mortgage or lien. The Commission's statements in this regard were viewed as preserving for the Commission an absolute

right of approval over the disposition of station licenses, as well as requiring certain procedural actions in connection with an involuntary sale of station assets.[1/] However, until recently, such statements were not thought to call into question the fundamental premise of senior secured broadcast lending--i.e., that a senior secured lender, with a first priority security interest in all tangible and intangible station assets, is entitled to the sale proceeds or other value realized from disposition of a station's assets (including FCC licenses), in priority to other creditors or third parties.

Thus, senior secured broadcast lenders have had the reasonable expectation that, subject to compliance with appropriate legal processes and the requirement for Commission approval of any assignment or transfer of control of station licenses, they ultimately would be able to obtain repayment of

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1/ For example, when an involuntary disposition of a broadcast station's assets is necessitated (e.g., as a result of foreclosure or bankruptcy), creditors typically have sought court appointment of a receiver or trustee to take control of the assets and to operate the station on an interim basis. The FCC views this appointment as supporting an involuntary assignment of the license to the receiver or trustee, with approval obtained by filing a "short form" (FCC Form 316) application, 47 C.F.R. § 73.3541, which is usually granted pro forma. See La Rose v. F.C.C., 494 F.2d 1145, 1148 (D.C. Cir. 1974). The receiver/trustee then may dispose of the station's assets and license to a Commission-approved assignee. The Commission will not permit the assignment of a "bare license" (i.e., a license without a concurrent sale of the station's assets). E.g., In re Donald L. Horton, 10 F.C.C.2d 271 (1967); In re Bonanza Broadcasting Corp., 10 F.C.C.2d 906 (1967). Therefore, the foreclosure or other compelled sale of a station's assets ordinarily results in a concurrent assignment of the license, subject, of course, to Commission approval of the assignee.

their loans from the full market value of the station assets securing such loans.

C. The Effect of Recent Bankruptcy Cases

This expectation has been disturbed by certain recent court decisions arising out of bankruptcy proceedings. With only a modicum of independent reasoning, these decisions, citing statements made by the Commission, have held that a security interest cannot be taken in a broadcast license and, therefore, that the collateral securing broadcast loans was worth much less than the going-concern value of the station comprising such collateral. Stephens Indus., Inc. v. McClung, 789 F.2d 386 (6th Cir. 1986); In re Oklahoma City Broadcasting Corp., 112 Bankr. 425 (Bankr. W.D. Okla. 1990); In re Smith, 94 Bankr. 220 (Bankr. M.D. Ga. 1988); see also Continental Bank, N.A. v. Everett, No. 90-C-1476 (N.D. Ill. March 28, 1991) (Westlaw, 1991 WL 42690). For example, in In re Oklahoma City Broadcasting Corp., supra, the court held that a bank's perfected security interest in all of the debtor's assets (other than the FCC licenses) would be valued only at the "liquidation value" of the debtor's tangible assets, plus a small amount for relationships with advertisers. This resulted in a $2 million valuation of the lender's collateral even though a third party had offered to buy the station for $3 million. In Stephens Indus., Inc. v. McClung, supra, the station was sold for $200,000, but the value of the secured lender's collateral was found to be approximately $8,000. The same sort of analysis, if applied to other broadcast stations, could produce even more skewed results, since it is not

uncommon for the intangible "going-concern" value of a radio or television station to be many millions of dollars more than the liquidation value of its tangible assets.

Such an analysis could be severely adverse to a secured lender in the bankruptcy context, where the extent of "priority" of a secured creditor's claim vis-a-vis other creditors is limited to the value of the assets subject to its security interest. Moreover, a determination that a lender is "undersecured" (i.e., that the value of the lender's collateral is less than the amount of the lender's claim) can deprive the lender of its rights to "post-petition interest" (i.e., interest accruing on its loans subsequent to the filing of the bankruptcy petition) and place the lender in an adverse procedural posture in the proceeding.

The results in cases such as In re Oklahoma City Broadcasting Corp. run counter to the expectations of both the lenders who have extended broadcast loans and the borrowers who have received them.[2/] Such cases have understandably shaken lender confidence and have contributed significantly to the current unavailability of broadcast financing. The results in these cases do not advance Commission policy. Rather, they unfairly injure both lenders who have supported the broadcasting

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2/ Indeed, Commenters believe that In re Oklahoma City Broadcasting Corp. and similar cases were wrongly decided as a matter of federal bankruptcy law, regardless of the Commission's position with respect to the validity of security interests in station licenses. However, this belief does not lessen the need for the Commission to clarify its prior statements regarding broadcast station security interests, in order to eliminate the confusion engendered by such statements.

industry in the past and broadcasters who will be unable to obtain adequate financing in the future.

II. CREDITORS SHOULD BE PERMITTED TO TAKE A LIMITED SECURITY INTEREST IN RIGHTS ATTENDANT TO A BROADCAST LICENSE

The Petition chronicles the genesis of Commission statements that a security interest may not be granted in a broadcast license. Petition at 7-12. As this history demonstrates, such statements constitute dicta contained in cases which sought to enforce an entirely distinct Commission policy--the prohibition against unauthorized reversionary interests in broadcast licenses, codified at 47 C.F.R. § 73.1150. Radio KDAN, Inc., 13 R.R.2d 100 (1968); Kirk Merkley, 94 F.C.C.2d 829 (1983), recon. denied, 56 R.R.2d 413 (1984). Once stated in Radio KDAN, Inc. and Kirk Merkley, the proposition that a security interest cannot be granted in a broadcast license has simply been repeated, and erroneously characterized as constituting a "long-standing" Commission policy, without further analysis or justification. See, e.g., Minority Ownership in Broadcasting, 99 F.C.C.2d 1249, 1253 (1985).[3/]

Given the factual context of Radio KDAN, Inc. and Kirk Merkley, the Commission's statements in these cases might well have been limited solely to security interests in station licenses taken by a former licensee of the station. To the extent these cases articulate a rationale going beyond the

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3/ Certain other cases sometimes cited in support of these statements stand simply for the principle that a secured creditor does not have greater rights with respect to broadcast authorizations than the licensee itself--a proposition that Commenters do not contest. See, e.g., Twelve Seventy, Inc., 6 R.R.2d 301 (1965).

prohibition on "reversionary" security interests, it appears to have two aspects:

> (i) That a broadcast license is not "an owned asset or vested property interest" such that it can be subject to a mortgage or lien; and
>
> (ii) That the hypothecation of a broadcast license would "endanger the independence of the licensee who is and should be at all times responsible for and accountable to the Commission in the exercise of the broadcasting trust."

Kirk Merkley, supra, at 830-831; Radio KDAN, Inc., 13 R.R.2d at 102. However, as discussed below, recognition of a limited security interest in broadcast licenses would neither be inconsistent with the principle that a broadcast license is not "an owned asset" nor threaten in any way the responsibility and accountability of Commission licensees.

A. A Broadcast License Grants Certain "Rights" to Licensees, Which Can Be Subject to a Limited Security Interest Granted to Creditors

As noted above, the Commission's statements prohibiting hypothecation of a station license rest primarily on the principle that the license is not an "owned asset." This, of course, is true in the sense that a licensee does not have an unrestricted right to alienate the license as "property," and the privileges granted to the licensee pursuant to the license are subject to restrictions imposed by the Commission in the exercise of its statutory authority. Moreover, the Communications Act explicitly precludes a licensee from having ownership rights in

the broadcast frequency subject to the license. 47 U.S.C. §§ 301, 304. The legislative history of Sections 301 and 304 shows that Congress's concern was protecting against private claims to the "ether," a protection that is buttressed by the waiver of rights in the ether required of all broadcast licensees. See Petition at 14-18. Both the statutory language and its legislative history, however, make clear that Congress's intent was to prohibit ownership rights vis-a-vis the government, not vis-a-vis third parties. Neither Commenters nor the Petitioner seek to interfere in any way with this statutory prohibition.

On the other hand, the Commission has recognized that a broadcast license does confer certain "rights" on the licensee. For example, in In re Bill Welch, 3 F.C.C. Rcd. 6502, 6503, n. 27 (1988), the Commission stated that "the fact that Section 301 provides that licensees may have no 'ownership' interests in frequencies does not mean that they have no rights in the license itself." Id., at 6503, n. 27. To the contrary, the Commission found that a broadcasting license is "more than a mere privilege"; it is "a thing of value to the person to whom it is issued" and "confers a private right, although a limited and defeasible one." Id. (quoting L.B. Wilson, Inc. v. FCC, 170 F.2d 793, 798 (D.C. Cir. 1948)). Thus, even if the Commission is unwilling to recognize a security interest in a broadcast license itself, it should at least be willing to recognize a security

interest in certain of the "rights" of the licensee attendant to such license.[4/]

Notable among the "rights" of a broadcast licensee is the right granted under Section 310(d) of the Communications Act to initiate an assignment or transfer of control of the broadcast license pursuant to contractual arrangements with third parties. Section 310(d) permits the licensee to assign its broadcast license (subject to Commission approval of the assignee) free from a challenge that a third party would be better suited as a licensee.[5/] 47 U.S.C. § 310(d). This right in itself has substantial value: It allows the licensee to designate its potential successor in conjunction with a sale of a station's assets, thus ensuring that the licensee, rather than the government, receives any "value" attributable to the station license and the right to continue operation of the station as a going concern.

[4/] The Uniform Commercial Code requires only that the grantor of a security interest have "rights" in the collateral, not "ownership" thereof. Of course, the secured party acquires an interest in nothing more than the rights possessed by the grantor of the security interest. See U.C.C. § 9-203(1)(c).

[5/] The relevant text of section 310(d) states:

> No construction permit or station license, or any rights thereunder, shall be transferred, assigned, or disposed of in any manner . . . except upon application to the Commission and upon finding by the Commission that the public interest, convenience, and necessity will be served thereby. . . . [I]n acting thereon the Commission may not consider whether the public interest, convenience, and necessity might be served by the transfer, assignment, or disposal of the permit or license to a person other than the proposed transferee or assignee.

The legislative history of Section 310(d) (formerly 310(b)) confirms that the grant of this "right" was intentional. The Senate Report accompanying the amendment states that Congress's intention was "to annul the so-called AVCO procedure," under which the Commission had required that others have an opportunity "to make bids for any radio station proposed to be sold." S. Rep. No. 44, 82d Cong., 1st Sess. 8 (1951). The Report goes on to term the AVCO procedure "an unwise invasion by a Government agency into private business practice." Id. Congress thus intended to protect this "private business practice" by granting a licensee the right to contract to sell its station operations for a profit.[6/]

There is no basis under the Communications Act or in the Commission's rules and policies for prohibiting a lender from obtaining a security interest in this "right" of the licensee. Nor is there any conceivable rationale for inhibiting the assignment to a lender of the proceeds or other value attributable to disposition of a station's assets, including its broadcast licenses, pursuant to an exercise of this right. Yet the needs of Commenters and other commercial lenders could be met in significant part simply by the Commission's recognition of a "limited security interest" in these two rights: (i) the right, subject to appropriate Commission safeguards, to initiate the process for Commission approval of the assignment of station

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6/ Congress specifically rejected a proposed provision of the Communications Act that would have prevented a licensee from selling a station for consideration greater than "the reasonable value of the apparatus" utilized by the station. See In re Bill Welch, supra, at 6504.

licenses to a party acquiring other station assets in which a secured lender has a valid security interest, and (ii) the right to value realized and/or realizable from disposition of a station's assets and operations, whether or not such value is deemed to result from the station's FCC licenses.

B. Courts Have Recognized Valid Security Interests in Similar Licenses and License Rights

Numerous courts have recognized a valid security interest in governmental licenses and/or the right to transfer such licenses and obtain value therefrom. Such security interests have been recognized even where the governmental body that grants the license maintains regulatory supervision over the license, and even where the license itself is not considered "property" of either the licensee or the secured creditor.

1. Liquor License Cases

In re Kluchman, 59 Bankr. 13 (Bankr. W.D. Pa. 1985), and similar cases dealing with state-issued liquor licenses, provide an appropriate analogy. In In re Kluchman, the creditor bank was a party to a security agreement granting it a security interest in, inter alia, all "goods" and "property, rights and interests of the debtor," including the debtor's state liquor license. After filing a petition under Chapter 11 of the Bankruptcy Code, the debtor claimed that the liquor license could not be the subject of a valid security interest. The court held that, even if the license itself could not be subject to a security interest, certain rights in the liquor license--including the right to transfer and obtain value from the license--could be subject to a security interest. The

creditor bank therefore had a valid security interest in the proceeds of the sale of the debtor's license.

The court distinguished a case that arose in a license revocation proceeding, because vis-a-vis the state a security interest in a license could have no effect. Id. at 15.[1] However, the court found that the license holder nonetheless had been granted certain "intangible rights" accompanying its license. These included the right to transfer the license and to receive the proceeds from that transfer. Id. Moreover, the licensee's intangible interests in the license could be secured through a valid security agreement. The court noted that the state had the right not to re-issue the license to a transferee designated by the license holder, but did not believe this eliminated the secured party's right to the proceeds of a sale of the license and assets which had been approved by the appropriate state authority.

Other cases dealing with liquor licenses reach a similar result. In Paramount Finance Company v. United States, 379 F.2d (6th Cir. 1967), the Sixth Circuit recognized the validity of a security interest in rights attached to the license. The court held that the defaulting taxpayer could not unilaterally transfer title of its liquor license to its creditor. However, the court held that a security interest could be granted in the license that would at least entitle the secured

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[1] The non-recognition of private rights in the license vis-a-vis the state is equivalent to the Communications Act's prohibition of ownership rights in the ether.

lender to priority rights to proceeds generated from the sale of the license:

> It is agreed by the litigants that this taxpayer's liquor license had pecuniary worth, so whether the license created a * * * 'property' right, is immaterial; for here, * * * the tag 'property' simply symbolizes the fact that courts enforce a claim which has pecuniary worth.
>
> The fund produced by the sale by the defendant of the taxpayer's tavern and its liquor license represents the value of its business which was hypothecated to the lender under a security agreement perfected long before the taxpayer's property was seized by the defendant. We agree with the District Court that the fund remaining should be applied to the satisfaction of the lender's rights thereunder.

Id. at 545 (citations omitted). See also In re Tittabawassee Investment Co., 831 F.2d 104, 106 (6th Cir. 1987) (liquor license treated as property interest); Bogus v. American National Bank, 401 F.2d 458, 460-61 (10th Cir. 1968) (liquor license is "property" within meaning of U.C.C. because, even though state law terms license a "personal privilege" and prohibits attachment, garnishment or execution, license has "an element of transferability"); In re Bennett Enterprises, Inc., 58 Bankr. 918, 919 (Bankr. D. Mass. 1986) (liquor license could be pledged as collateral; between private parties it is "a valuable asset"); In re Matto's, Inc., 9 Bankr. 89, 91 (Bankr. E.D. Mich. 1981) ("pecuniary interest or capital which the [liquor] license represents" is property for purposes of Bankruptcy Act (citing Fisher v. Cushman, 103 F. 860, 866 (1st Cir. 1900)); this is true despite fact that state can place conditions on transfer of license).

In sum, despite semantic quibbles among these decisions as to whether a license constitutes "property," or whether the security interest being enforced is in "the license itself" or in "rights" attendant thereto, all of these cases reach a uniform result. They permit a security interest on the part of a secured creditor that extends at least to the licensee's rights to transfer, and obtain a pecuniary benefit from, its license. As discussed above, it is principally these rights in which broadcast lenders require a security interest to ensure that their loans to broadcast licensees will be fully secured.

2. Other Cases Holding That Rights Attendant to A Government License Can Be Subject to a Security Interest

Cases in other areas have also recognized that a license or similar governmental right can be subject to a security interest. For example, in In re Rainbow Express, 179 F.2d 1 (7th Circ.), cert. denied, 339 U.S. 981 (1950), the court held that a creditor could have a valid security interest in an ICC Certificate of Public Convenience and Necessity. The chattel mortgage held by the creditor pledged the ICC Certificates as security and the debtor had agreed that upon default the creditor could "sell and dispose of the said mortgage rights and properties." The court stated that there was a "property right or interest" in the Certificate and that the lien could attach under the chattel mortgage, because the Certificate was "endowed with a proprietary interest capable of transfer." Id. at 5.

Similarly, in First Pennsylvania Bank, N.A. v. Wildwood Clam Co., 535 F.Supp. 266, 268 (E.D. Pa. 1982), the court held

that a state-issued clamming license can be subject to a security interest. The court drew upon a Pennsylvania court case that viewed "certificates" such as a license as constituting "bundles of rights."

While it did not deal with a state-granted license, In re Hengalo Enterprises, 51 Bankr. 54 (Bankr. S.D. Fla. 1985), held that franchise agreements whose transferability was restricted by state law could be subject to a security interest. The court (quoting from the Uniform Commercial Code Reporter Service) stated that "the necessity for approval [before transferring a license] alone does not mean that it cannot be used to secure an obligation." Id. at 55. See also Freightliner Market Dev. Corp. v. Silver Wheel Freightlines, Inc., 823 F.2d 362, 369 (9th Cir. 1987) (transportation operating authorizations granted by the state are subject to a security interest because they are "property" as between two private parties); In re Sunberg, 729 F.2d 561, 563 (8th Cir. 1984) (regulatory restrictions on assignments of USDA payment-in-kind program only governed rights of parties vis-a-vis government; such regulations "do not prevent one who is entitled to the benefits from pledging the benefits as security on loans properly made under state law").

3. FAA "Landing Slot" and Health Care Facility Cases

Cases dealing with FAA "landing slot" authorizations and health care facility licenses also support the proposition that important government-regulated licenses can confer "rights"

and proprietary "interests" in which a security interest is capable of being granted.

FAA landing slot authorizations are comparable to broadcast licenses in many ways. Both are highly regulated. Every air carrier must obtain a certificate of public convenience and necessity prior to engaging in air transportation. 49 U.S.C. § 1371(a). In a statutory provision akin to sections 301 and 304 of the Communications Act, the Federal Aviation Act states that "[n]o certificate shall confer any proprietary, property or exclusive right in the use of any airspace, Federal airway, landing area, or air navigation facility." 49 U.S.C. § 1371(i). The FAA has sole authority to allocate landing slots at certain United States airports with high traffic density. These slots thus grant specific rights to limited airport access, much the same as an FCC license grants specified rights to limited radio spectrum.

Several cases involving FAA landing slots have found them to involve a property "right" or "interest" in the bankruptcy context. For example, in In re American Central Airlines, Inc., 52 Bankr. 567 (Bankr. N.D. Iowa 1985), the court read 49 U.S.C. § 1371(i) as prohibiting the creation of property rights in "air space." The court went on to state, however, "there is no equivalent provision barring the FAA from creating a property interest through a grant of access to an airport." Id. at 570. The court also stated that

> [a]lthough the FAA may remove a slot at any time, until such action is taken, the holder has a possessory interest in a slot at the given airport. Such a possessory interest

> must constitute property of the estate. The mere fact that an interest exists by the grace of government no longer precludes the interest from being treated as a property right.

Id. at 571 (citation omitted, emphasis added). Accord In re Gull Air, Inc., 890 F.2d 1255, 1260 (1st Cir. 1989) ("By granting carriers the right to buy and sell slots with the intent of maximizing reliance on market forces and minimizing government involvement regarding slot distribution, the FAA grants to carriers a limited proprietary interest in slots," albeit one that is "limited as to the superior rights of the FAA.")

State-issued licenses in the health care field have also been found to be "property" of the licensee for certain purposes. For example, in In re St. Louis South Parks II, Inc., 111 Bankr. 260, 261 (Bankr. W.D. Mo. 1990), a state-granted Certificate of Need to build a nursing home was conceded to be property of the debtor's estate because the Certificate had "pecuniary value" to the debtor. See also In re National Hospital and Institutional Builders Co., 23 Collier Bankr. Cas. (MB) 533 (Bankr. S.D.N.Y. 1980) (finding Certificate of Occupancy to be "property" of the debtor).

In sum, there is ample precedent for the proposition that broadcast licenses, while concededly subject to the superior rights of the FCC vis-a-vis the licensee, nevertheless create, as between private parties, rights in which a valid security interest can be granted.

C. Recognition of a Limited Security Interest Would Not Undermine the Responsibility and Accountability of Licensees

As noted above, the Commission has expressed a concern that hypothecation of a license would endanger the independence of broadcast licensees and their accountability to the Commission. However, such concerns should not be engendered by the type of limited security interest sought by Commenters.

Commenters do not suggest that a limited security interest in station licenses or rights attendant thereto would entitle a secured party to control or operate a station. The interests of a secured party need not extend to the operational rights conferred by a station license. Even in a foreclosure situation, neither the secured party nor a third party purchaser would succeed to such operational rights, unless and until assignment of the station license to such party was approved by the Commission pursuant to the Commission's normal processes. Nor would the existence of such a security interest in any way diminish the responsibility of the licensee to operate the station in accordance with Commission policies and the terms of its license. Indeed, the most significant rights granted to the secured party pursuant to its security interest would arise only in connection with a disposition of the license to a third party pursuant to Commission approval. Thus, the specter of endangering licensee responsibility and independence should not be a factor with respect to the limited security interest sought here.

As Petitioner points out, concerns about licensee independence have not prevented the Commission from recognizing the validity of a pledge of the stock of a licensee, subject to the requirement for Commission approval prior to a "foreclosure" pursuant to such pledge. From the perspective of a senior secured lender, however, a stock pledge is inadequate, in that ownership of the stock of a broadcast licensee places the creditor only in the shoes of the equity holder of the station--i.e., junior to the claims of other creditors. This is not the position that the senior secured creditor has bargained for; it deserves to have a priority interest in the value created by station assets, and to be paid in advance of other creditors.

Indeed, certain lenders and borrowers have attempted to overcome the deficiencies of a conventional stock pledge by creating more innovative arrangements to protect the secured creditor's rights in the borrower's collateral. These include an arrangement whereby the operational assets of a station are held by one entity, with the license itself being held separately by a second affiliated entity, which contracts with the first entity for provision of all necessary assets and services. The stock of the license holder (which has no other indebtedness or trade obligations) is pledged to the secured creditor; the secured creditor also holds a security interest directly in the operational assets held by the affiliated entity. Thus, this structure enables the secured lender to secure its rights in the value represented by the station's license, while at the same time protecting its priority position in station collateral by